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SALIENT LEGAL ISSUES IN THE ENFORCEMENT OF FUNDAMENTAL RIGHTS IN NIGERIA BY DR. OGWU J. ONOJA, SAN, FCArb.

1.0 INTRODUCTION

1.1 Fundamental rights have been defined as basic and inalienable legal guarantees[1] that people in all countries and cultures have simply because they are human beings. In the words of the renowned French philosopher and legal theorist Jacques Maritain:

> **"The human person possesses rights because of the very fact that it is a person, a whole, master of itself and of his acts, and which consequently is not merely a means to an end but an end, an end which must be treated as such. The dignity of the human persons! The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to man because of the very fact that he is a man."[2]**

1.2 Human rights govern how individual human beings live in society and with each other, as well as their relationship with the State and the obligations that the State has towards them. Human rights law obliges governments to do certain things, and prevents them from doing others. Individuals also have responsibilities: in using their human rights, they must respect the rights of others. No government, group or individual person has the right to do anything that violates another's rights.

In **Ransome-Kuti v. Attorney General of the Federation**, Eso, JSC stated that:

> **"A fundamental right is a right which stands above the ordinary laws of the land and which are in fact antecedent to the political society itself and it is a primary condition to civilized existence."[3]**

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[1] Jaiyesimi v. Darlington (2022) 9 NWLR (Pt.1835) 335 at 365.

[2] Jacques Maritain, "The Rights of Man and Natural Law", 65, D. Anson trans. 1943

[3] (1985) 2 NWLR (Pt. 6) 211 at 230.

1.3 Fundamental rights are those rights without which neither liberty nor justice would exist. They are rights provided for in Chapter IV of the Constitution and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act).[4] These rights encapsulate freedoms essential to the concept of ordered liberty, inherent in human nature and consequently inalienable. They are rights that belong without presumption or cost of privilege to all human beings. They are frequently held to be universal in the sense that all people have and should enjoy them, and to be independent in the sense that they exist and are available as standards of justification The legal cum moral doctrine of fundamental rights aims at identifying the fundamental prerequisites for each human being leaving a minimally good life.

1.4 Nigeria has rich jurisprudence in the field of human rights law and its enforcement. As a result of the long years of military dictatorship, there was suppression and gross abuse of fundamental rights which Nigerian lawyers and the courts fought valiantly to protect.[5] The return to democracy in 1999 further emboldened the courts in their role as bastion of human rights and in this regard they have been unrelenting in making pronouncements and giving judgments to curb the human right abuses and infringements by individuals and government. Executive lawlessness particularly by security agencies is taken with seriousness by the courts whenever such abuses are tabled before the court. The courts ensure that human rights abuses are met with strict censure of the law. In **Aviomoh v. C.O.P,** the Supreme Court in vigorous terms held that:

> **"The Courts must protect human rights and resist any attempt or legislation that would directly or indirectly erode the efficacy of the inalienable fundamental rights donated by the 1999 Constitution."[6]**

Similarly, in **Dasuki v. Director-General, S.S.S**, the Court of Appeal harped on the duty of the courts in protecting human rights thus:

> **"The mandate to enforce fundamental right is a very prime**

[4] Osondu & Anor v. A.G Enugu State & Ors (2017) LPELR-43096.
[5] Nnaemeka Agu "Freedom of Expression and of the Press and the African Charter" (1993) 19 *Commonwealth Law Bulletin* at p.1761.
[6] (2022) 4 NWLR (Pt.1819) 69 at 110 paras G.

and fundamental one. Every court must stand up to defend the right of the citizenry."[7]

1.5 In ensuring that fundamental rights are protected, the courts deploy the provisions of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and the Fundamental Rights Enforcement Procedure Rules, 2009 as well as international laws and treaties of which Nigeria is signatory to all of which occupy prime position in the fundamental rights ecosystem of laws and jurisprudence.[8] It is important to stress that apart from the courts there are also other bodies like the National Human Rights Commission, the security agencies, National Orientation Agency, Legal Aid which have significant roles to play in the enforcement of fundamental rights. Other stakeholders include Civil Society Organizations (CSO's), Law Student Societies etc. All these bodies are part of the fundamental rights enforcement ecosystem.
This write up however aims to examine the salient legal issues in the enforcement of fundamental rights in Nigeria in the light of the Fundamental Rights Enforcement Procedure Rules, 2009 and in the course of the discussion, references will be made to these institutions and bodies mentioned above.

2.0 SALIENT LEGAL ISSUES IN THE ENFORCEMENT OF FUNDAMENTAL RIGHTS IN NIGERIA

2.1 Before delving into an extensive examination of the topic, it is necessary to outline the salient legal issues which pertain to the enforcement of fundamental rights in Nigeria thus:

(i) The Constitutional Foundation or Grundnorm for the Enforcement of Fundamental Rights in Nigeria
(ii) The Legal Implication of the Preamble to the FREP Rules, 2009
(iii) Cause of Action: Matters that fall within the ambit of Fundamental Rights
(iv) Corporate Entities and FREP Proceedings
(v) Main Claim versus Ancillary Claim
(vi) Limitation Laws and FREP
(vii) Consolidation and Joint Applications in FREP Proceedings

[7] (2020) 10 NWLR (Pt.1731) 136 at 151, paras. B-F. See also Ezeamaka v. C.O.P, Cross Rivers State (2022) 18 NWLR (Pt.1862) p. 369 at 403-404, paras. H-A.
[8] M.B. Idris and Yemi Oke, "Law and Procedure for the Enforcement of Human Rights in Nigeria", Lawlords Publications (2013) p.20.

(viii) Power of the Police and Law Enforcement Agencies to Carry out their Statutory Functions Vis-A-Vis the Enforcement of Fundamental Rights
(ix) Derogation and Limitation on Fundamental Rights.
(x) The Place of Virtual and Remote Hearings in the Enforcement of Fundamental Rights.
(xi) Suggestions on Improving the Enforcement of Fundamental Rights.

2.2 These are all matters of practical importance that significantly affect the enforcement of fundamental rights in Nigeria. Their importance lies in the fact that beyond the question of breach of any fundamental right, these legal issues determine the enforceability of the rights themselves before the courts since the courts are essentially the theatre of action where the question as to the enforceability or otherwise of a particular fundamental right or set of fundamental rights is determined.

3.0 THE CONSTITUTIONAL FOUNDATION OR GRUNDNORM FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS IN NIGERIA

As earlier submitted in the introduction, fundamental rights are basic, inalienable rights which are constitutionally guaranteed. What this means is that even though fundamental rights are natural rights which precedes the legal system of laws and constitutions, there are often provided for and guaranteed in the constitution of most nations. In other words the Constitution is the grundnorm and basic legal foundation for the enforcement of fundamental rights. In Nigeria, our constitutions beginning from the 1963 Constitution and the 1979 Constitution and the present 1999 Constitution of the Federal Republic of Nigeria all contain bill of rights wherein the citizens' fundamental rights are provided and the modalities for their protection spelt out. **In Oko v. A.G Ebonyi State (2021) 14 NWLR (Pt. 1795) 63 at 107 paras F-G** it was held thus: Under Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 as amended, every Nigerian citizen has fundamental rights which accrue from birth and remain with them until death. If those rights are not violated in one form or way, the holder of the rights would not have cause of action against any person or a right of action against anybody.

Beyond providing for fundamental rights, the 1999 Constitution further clothes the courts with jurisdiction to determine questions of infringement of fundamental rights. This is contained in section 46(1) and of the Constitution which provides as follows:

> **"Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in**

any State in relation to him may apply to a High Court in that State for redress."

Also Section 46 (3) of the 1999 Constitution empowers the Chief Justice of Nigeria to make rules with respect to the procedural framework for the enforcement of fundamental rights in the court. The Section provides thus:

"The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section."

This Section is important because without it the rules that operate to guide fundamental rights enforcement proceedings. Consequently, it is pursuant to this Section that the Chief Justice of Nigeria enacted the Fundamental Right (Enforcement Procedure) Rules 2009.

An evaluation of Chapter IV of the 1999 Constitution, will reveal the following sections and corresponding fundamental rights which are constitutionally protected, namely:

(a) Section 33 - Right to life
(b) Section 34 - Right to dignity of human person
(c) Section 35 - Right to personal liberty
(d) Section 36 - Right to fair hearing
(e) Section 37 - Right to private and family life
(f) Section 38 - Right to freedom of thought, conscience and religion
(g) Section 39 - Right to freedom of expression and the press
(h) Section 40 - Right to peaceful assembly and association
(i) Section 41 - Right to freedom of movement
(j) Section 42 - Right to freedom from discrimination
(k) Section 43 - Right to acquire and own immovable property anywhere in Nigeria
Section 44- Right against compulsory acquisition of property.

Section 46 of the 1999 Constitution only refers to "High Court" in a State without defining it to mean a "State High Court" or the "Federal High Court". However, the Chief Justice of Nigeria in the exercise of his powers under **section 46(3)** promulgated the FREP Rules, 2009 and pursuant to **Order I** thereof, "Court" is defined to mean the "Federal High Court" or the "High Court of a State or the High Court of the Federal Capital Territory, Abuja". In this wise, it is important for

litigants and their Counsel to be conversant with the jurisdiction as regards venue of the action and also the subject matter and territorial jurisdiction relating to the cause of action as determinable from the claim of the applicant.
In **Loveday v. Comptroller, Fed. Prisons, Aba (2013) 18 NWLR (Pt. 1386) 379 at 405-406, paras. H-C,** the Court of Appeal held thus:

> **"Section 46 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) gives to any person who alleges that any of the provisions of chapter IV of the Constitution has been, is being or is likely to be contravened in any state in relation to him may apply to High Court in the state for redress. It also confers on a High Court original jurisdiction to hear and determine any application made to it pursuant to the provisions of the section to make any orders, issue any writs and give such directions as it may consider appropriate for the purpose of seeking the enforcement within that state of any right to which the person who makes the application may be entitled to under the chapter. The provision of Order I Rule 2, Fundamental Rights (Enforcement Procedure) Rules defined court to mean the Federal High Court or the Court of a State. What this means is that both the Federal High Court and the High Court of a State have concurrent jurisdiction in matters of enforcement of fundamental rights."**

In an application for enforcement of fundamental rights, the issue of jurisdiction is fundamental because where there is no jurisdiction in the court to hear and determine a cause or matter, everything done in consequence thereof is a nullity.[9]

It is therefore important that a counsel approaching the court ensures that he is approaching the proper forum otherwise the matter will be incompetent for want of jurisdiction.

4.0 THE LEGAL IMPLICATION OF THE PREAMBLE TO THE FUNDAMENTAL RIGHTS ENFORCEMENT PROCEDURE RULES, 2009

4.1 Before the Fundamental Rights Enforcement Procedure Rules, 2009 was

[9] See Mustapha v. Gov., Lagos State (1987) 2 NWLR (Pt. 58) 539; Kurma v. Sauwa (2018) LPELR-46317 SC;

enacted by the Chief Justice of Nigeria pursuant to the power conferred on him by Section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), fundamental rights proceedings were conducted under the Fundamental Rights Enforcement Procedure, Rules, 1979.[10] Upon the enactment of the 2009 Rules, the 1979 Rules were abrogated and ceased to function as the operational framework for fundamental rights proceedings in Nigeria.

4.2 There are several differences with marked legal ramification between the 1979 Rules and the 2009. The most significant distinction is the preamble to the 2009 Rules. In enacting the 2009 FREP Rules, his lordship included a preamble encapsulating preliminary areas of law that are relevant for the courts' jurisdiction in enforcement of fundamental rights.[11] It is important to stress the function and legal significance of a preamble in legally enforceable instruments.

4.3 A preamble highlights the scope and limits of the law, sets out the purpose of or the objectives for the enactment and in summary fashion indicates the role or responsibilities accorded the courts and other persons in fulfilling the objectives of the law. In order words, the preamble of any legal instrument particularly in the case of an Act of the National Assembly or state law, captures the spirit and the essence of the law such that upon reading it, one gets a comprehensive preview of the law. The main function of a preamble is to clarify any ambiguity in a legal instrument. It is settled law and in fact, a cardinal rule of interpretation of both statutes and deeds that unless there is ambiguity in the operative part of either, recourse cannot be had to their preambles in aid of the interpretation of the operative parts thereof.[12] A preamble is undoubtedly part of the Act and it is a legitimate aid in construing the enactment particularly where there is an ambiguity or conflicting views as to the true meaning of the enactment in which case, the view that fits the preamble ought to be preferred.[13]

The elements distinguishing the 2009 FREP Rules from the 1979 FREP Rules

[10] Frank Agbedo, "Human Rights Litigation in Nigeria: Law, Practice and Procedure with Forms and Precedents", Unilag Press (2016) p.11-12.
[11] Chief Ogwu J. Onoja, SAN, "Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedents," Bar and Bench Publishers, (2020) Vol. I, p. 4.
[12] Ogbonna v. A. G. Imo State (1992) 1 NWLR (Pt. 220) 647 SC; Ogunlaja & Ors. v. Alimi & Ors. (2017) LPELR-42564 CA.
[13] Chief Ogwu J. Onoja, SAN, "Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedents," Bar and Bench Publishers, (2020) p.5.

are: (i)The application of international laws and conventions (ii) Public interest litigation (iii) Access to Justice (iv) Urgency and priority of fundamental rights actions. For want of time, I undertake hereunder to give a concise discussion of two of the most important elements contained in the preamble:

(i) The Application of International Laws and Conventions

The FREP Rules, 1979 had a gaping lacuna with respect to the application of international laws, treaties, conventions and bills in fundamental rights proceedings. This lacuna led to uncertainty and controversies flowed therefrom with regard to the applicability of international human right laws and their enforceability under the FREP Rules 1979. However, the Supreme Court in **Abacha v. Fawehinmi**[14] reaffirming its decision in **Ogugu v. State**[15] held that the provisions of the African Charter on Human and Peoples' Rights are applicable in Nigerian Courts and that the mode of instituting the action is as confirmed under the FREP Rules then in force. The FERP Rules, 2009 did not leave this issue to conjecture but codified the decision espoused in Fawehinmi's case, thus making the applicability of international laws and conventions to fundamental rights proceedings before our courts. This a principle of law enshrined in **paragraph 3(a)** and **(b)(i)(ii)** of the preamble to the FREP Rules, 2009. **It** states thus:

> **The overriding objectives of these Rules are as follows:**
>
> **(a) The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them.**
>
> **(b) For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is**

[14] (2000) 6 NWLR (Pt. 660) 228 at 293-294, paras. F-A
[15] (1994) 5 NWLR (Pt. 366) 1 at 25

aware, whether these bills constitute instruments in themselves or form parts of larger documents like Constitutions. Such bills include:

i. **The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system.**

ii. **The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system.**

It is therefore clear that international conventions and laws such as the African Charter on Human and Peoples' Rights, The United Nations Declaration of Human Rights and other treaties under the United Nations human rights system such as the Discrimination in Employment Convention, Racial Discrimination Convention and Economic, Social and Cultural Rights Covenant are applicable in Nigeria.

(ii) Public Interest Litigation

Fundamental rights are rights that pertain to persons as individuals. Our laws do not envisage or provide for laws that pertain to groups and the established general principle of law as decided in the *locus classicus* **Abraham v. Adesanya**[16] is that a person has no *locus standi* to seek reliefs before the court which will not be beneficial to him. However, it must be noted that fundamental rights proceedings are sui generis and in this regard, the preamble in paragraph 3(e)(i)-(v) has redefined and extended the scope of *locus standi* by giving persons, classes and groups, the right to institute fundamental rights action on behalf of others. This provision is revolutionary as it opens the door for civil society organizations active in the field of human rights advocacy to go beyond their traditional roles of non-litigation activism and become engaged in protecting human rights through litigation. Paragraph 3(e) provides:

"The Court shall encourage and welcome public interest litigations in the human rights field and no human rights

case may be dismissed or struck out for want of *locus standi.* In particular, human rights activists, advocates or groups as well as any non- governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

(i) Anyone acting in his own interest;
(ii) Anyone acting on behalf of another person;
(iii) Anyone acting as a member of, or in the interest of a group or class of persons;
(iv) Anyone acting in the public interest, and
(v) Association acting in the interest of its members or other individuals or groups."

Locus standi in law is the legal capacity with which a plaintiff or applicant must be imbued in order to institute legal proceedings in a court of law. It is the "standing to sue" or "title to sue".[17] This definition of *locus standi* was given a narrow interpretation and application under the FREP Rules, 1979. The courts had in several cases held that only persons whose fundamental rights have been, are being or likely to be violated could challenge such violations; that is, the applicant must apply to court himself, not by a third party. These decisions comply with the principle and spirit of *locus standi* under the common law and particularly **section 46(1) of the 1999 Constitution**, which uses the word "any person", which refers to an individual.[18]

Fortunately, this very rigid and narrow stance by our courts was moderated in some later decisions particularly in **Fawehinmi v. Halilu Akilu[19]**, where the Supreme Court through the concept of "brother's keeper" opined that public interest litigation should be allowed, which is a clear departure from the principle in **Abraham Adesanya's** case. The contemporary position taken by our courts is potently captured in the dictum of Ikyegh, JCA in **Babalola v. A.G. Federation & Anor.**, where Ikyegh, JCA held thus:

[17] Ogheneovo v. Gov, Delta State (2023) 2 NWLR (pt.1868) 275 at 304-305, paras. F-E.
[18] University of Ilorin v. Oluwadare (2003) 3 NWLR (Pt. 806) 557 CA; Gov. of Ebonyi State v. Isuama (2004) 6 NWLR (Pt. 870) 511.
[19] (1987) 4 NWLR (Pt.67) 797.

"The issue of standing to sue was widened by the Supreme Court in *Fawehinmi v. Akilu* (supra) in 1987 after *Adesanya* (supra) was decided in 1981 that "it is the universal concept that all human beings are brothers' assets to one another" especially in this country where the socio cultural concept of 'family' includes nuclear family or extended family which transcends all barriers (to paraphrase Eso, J.S.C, in *Fawehinmi v. Akilu* (supra). Then in Fawehinmi v. The President (supra) Aboki J.C.A., held inter alia that - ".....since the dominant objective of the rule of law is to ensure the observance of the law, it can best be achieved by permitting any person to put the judicial machinery in motion in Nigeria whereby the citizen could bring an action in respect of a public derelict. Thus, the requirement of *locus standi* becomes unnecessary in constitutional issues as it merely impede judicial functions." (My emphasis). To demonstrate that public spirited litigation in fundamental rights related cases is now the norm, the FREPR 2009 made pursuant to Section 46(3) of the 1999 Constitution and thus clothed with constitutional force expanded the horizon of locus standi in fundamental rights cases in paragraph 3(e) thereof thus - "3(e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates or groups as well as any nongovernmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following: (i) Anyone acting in his own interest; (ii) Anyone acting on behalf of another person; (iii) Anyone acting as a member of, or in the interest of a group or class of persons; (iv) Anyone acting in the public interest, and (v) Association acting in the interest of its members or other individuals or groups."[20]

This innovation is however not without some criticism. G.O. Kolawole, J (as he then was) in **The Registered Trustees of Social Economic Rights and Accountability Project and 5 Others v. A.G. Federation and Another** declared paragraph 3(a) (b) and (e) of the preamble as *ultra vires* the powers granted the Chief Justice of Nigeria by section 46(3) of the 1999 Constitution

[20] (2018) LPELR - 43808 (CA)

of the Federal Republic of Nigeria (as amended). According to him the CJN does not have the *vires* to enact paragraph 3(e) because by so doing the CJN "**expanded the scope for "Applicants" who can apply to enforce the rights guaranteed by Chapter IV of the Constitution beyond the category of person which the drafters of Section 46(1) of the CFRN, 1999 as amended has provided for."**[21]

I however submit that this position as brilliant as it is, flies in the face of the decisions of the Supreme Court and Court of Appeal delivered in the era of the 1979 FREP Rules which hold that *locus standi* cannot be a bar in FREP proceedings. The preamble of the 2009 FREP Rules codified these decisions and has therefore effectively extended the scope of *locus standi* beyond its conventional limits in relation to FREP proceedings.[22]

The provision of paragraph 3(e)(i-iv) has no doubt broadened the scope and reach of persons who can file fundamental rights actions particularly in instances where the person is incarcerated or even dead. In **Dilly v. IGP**[23] and **Omonyahuy v. IGP**[24] the Court of Appeal relying on the provisions of paragraph 3(a) (b) (e)(i-iv) of the preamble to the FREP Rules, 2009 recognized the right of family members to institute fundamental rights proceedings for the enforcement of the right to life of deceased members of their family.

5.0 CAUSE OF ACTION: MATTERS THAT FALL WITHIN THE AMBIT OF FUNDAMENTAL RIGHTS

5.1 The point has been made that fundamental rights proceedings are *sui generis*. What this portends is that not all matters can be accommodated within the framework of fundamental rights actions. This is common to all matters and proceedings that are *sui generis* under our laws such as election petitions, matrimonial causes and matters, etc. It is in this regard, that the issue of cause of action becomes important. The Supreme Court in **Oko v. A.G Ebonyi State** defined cause of action in the following words:

A cause of action denotes a combination or group of operative

[21] Chief Ogwu J. Onoja, SAN, "Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedents," Bar and Bench Publishers, (2020) Vol. I, p. 32.
[22] *Ibid*. p.32
[23] (2016) LPELR-41452 CA.
[24] (2015) LPELR-25581 CA.

> **facts resulting in one or more basis for suing. In a sense, a cause of action is a factual situation that entitles one person to a remedy in court from another person.[25]**

In **Shell Petroleum Development Company Nigeria Ltd. v Nwawka[26],** the Supreme Court per Ayoola, JSC, held inter alia thus:

> **"Facts do not by themselves constitute a cause of action. For a statement of claim to disclose a reasonable cause of action, it must set out the legal rights of the plaintiff and the obligation of the defendant. It must then go on to set out facts constituting infraction of plaintiff's legal right or failure of the defendant to fulfill his obligation in such a way that if there is no proper defence, the plaintiff will succeed in the relief or remedy he seeks."**

5.2 In the light of the above definition and having it at the back of our minds that fundamental rights proceedings are unique, it is thus clear that for a matter to be enforceable under fundamental rights proceedings, it must come within the ambit of an allegation that a person's fundamental right is being, has been or is likely to be infringed upon or violated. This is captured in Order II Rule 1 of of the FREP Rules, 2009. It provides:

> **"Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress:"**

5.3 It therefore follows that for a person to have a cause of action under the FREP Rules, 2009, the facts which sets out the rights of the plaintiff, the breach of which entitles the plaintiff to relief from the court, must relate to the rights enshrined in **Chapter IV of the 1999 Constitution** particularly **sections 33 to 44.** In **Okafor v. Lagos State Govt.,** it was held thus**:**

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[25] (2021) 14 NWLR (Pt.1795) p.96 paras. A-B. See also Oshoboja v. Amuda (1992) 6 NWLR (Pt. 250) 690,
[26] (2003) 1 S. C. (Pt. II) 127 at p. 138.

> **"In order for a cause of action to be justifiable under the Fundamental Rights Enforcement Procedure Rules, the cause of action must come within the ambit of the enforcement of any fundamental right contained in Chapter IV of the Constitution of the FRN 1999 in the sense that the applicant alleges that any of the provisions of the Chapter has been, is being or is likely to be contravened in relation to him."**[27]

Also in **Hassan v. EFCC,** it was held thus:

> "**…the rights that can be enforced under the Fundamental Rights Enforcement Procedure Rules must be those ones that have been specifically mentioned in Chapter 4 of the 1999 Constitution. Hence Fundamental Rights Enforcement Procedure Rules cannot be used to institute an action for the enforcement of a right that has not been specifically enlisted in Chapter 4 of the Constitution of the Federal Republic of Nigeria 1999."**[28]

5.4 A combined reading of **paragraph 3(b) of the preamble** and **Order II Rule 1** hereof indicates that the FREP Rules, 2009 also allows cause of action based on rights as specified under the African Charter on Human and Peoples' Rights, Universal Declaration of Human Rights and other international protocols to which Nigeria is a signatory. Accordingly, any cause of action outside the provisions of Chapter IV of the Constitution and the applicable international charters and conventions are not enforceable vide the instrumentality of the FREP Rules, 2009. The Supreme Court took cognizance of this in **EFCC v. Diamond Bank Plc,** wherein it held thus:

> **"Any person who alleges that any of the fundamental rights provided for in the Constitution or the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress."**[29]

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[27] (2017) 4 NWLR (Pt. 1556) 404 at 425, paras. B-C; Diamond Bank Plc v. Opara (2018) 7 NWLR (Pt. 1617) 92 SC; Hassan v. EFCC (2014) 1 NWLR (Pt. 1389) 607 CA; Umoren & Anor. v. Udokong & Anor. (2019) LPELR-46849 CA.
[28] (supra) at 624, paras. D-E.
[29] (2018) 8 NWLR (Pt. 1620) 61 at 80, paras. G-H.

5.5 It is important to properly determine whether a particular matter involves the threatened breach or breach of fundamental rights because where a matter does not involve the potential breach or outright violation of human rights instituting it under the FREP Rules, 2009 automatically robs the court of jurisdiction. In **Nworika v. Ononeze- Madu & Ors,** the Supreme Court per Bage, JSC held thus:

> **"Cause of action necessarily touches on issue of jurisdiction. It is therefore fundamental to adjudicatory competence for a Court to first examine the basis of dispute, that is what led to instituting the suit, which is otherwise called 'Cause of Action". Any defect in the competence of a Court to entertain a matter is fatal, for the proceedings are a nullity, however well conducted. Consequently, a determination by any Court or Tribunal without jurisdiction confers no right or obligation."**[30]

5.6 Our courts have in a number of cases held that certain matters do not fall within the precincts of the FREP Rules, 2009. The courts have held that disputes involving title to land and chieftaincy tussles are not within the purview of fundamental rights to be enforced pursuant to the FREP Rules, 2009. It is the majority opinion of the courts in Nigeria that the fundamental rights enforcement procedure is designed for summary mode of dispute resolution, which renders it unsuitable for contentious action laden with controversy. Consequently, where suits are initiated by motion on notice or originating summons, and the reliefs sought by parties raise the issue of title to the land in dispute, such reliefs are by their very nature steep in controversy and in the circumstances inappropriate to initiate the action under the Fundamental Rights (Enforcement Procedure) Rules.[31].

5.7 Similarly matters that pertain to breach of contract whether commercial or employment contracts are not matters suitable for determination under the FREP Rules. Wrongful dismissal belongs to common law class of actions, which may be commenced by writ of summons. This is the normal procedure in actions tried on pleadings and to which the rules of pleadings apply. It cannot be prosecuted under Fundamental Rights (Enforcement Procedure) Rules. In **Ibe v. Ajise,** it was held that: "**a claim for breach of contract**

[30] (2019) LPELR – 46521.
[31] See Achebe v. Nwosu (2003) 7 NWLR (Pt. 818) 103 CA.

cannot be instituted under the Fundamental Rights (Enforcement Procedure) Rules, 2009…" [32] Also in **Look Engine Parts Ltd. & Ors. v. Eco Bank Plc & Ors.**, the Court of Appeal held that:

> **"FREP Rules are not meant to enforce common law right or mere contractual right unless such contractual rights also infringe the constitutional rights of the citizen."[33]**

5.8 Other classes of action which are inappropriate and cannot be instituted under the FREP Rules includes claims in torts[34], studentship,[35] political office disputes,[36] right to employment,[37] right to worship in a particular place or to belong to an organization.[38]

6.0 CORPORATE ENTITIES AND FREP PROCEEDINGS

6.1 We have seen that the scope of *locus standi* in FREP proceedings has been expanded by the provision of paragraph 3(e)(i-v) of the FREP Rules, 2009. Thus, in FREP proceedings the applicant may include anyone acting in his own interest, acting on behalf of another person, acting on behalf of a group or class of persons, acting in the public interest or interest of an association. This necessarily throws up the question regarding the position of corporate entities under FREP proceedings and by extension fundamental rights as enshrined in the Constitution.

6.2 Generally speaking, only juristic person either natural or legal can institute an action in court. The Supreme Court has held on categories of juristic personality in **Dairo v. Regd. Trustees, T.A.D., Lagos** thus**:**

> **"In consequence, only natural persons or body of persons whom statutes have, either expressly or by implication, clothed with the garment of legal personality could prosecute or defend law suits by that name…"[39]**

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[32] (2020) 10 NWLR (Pt.1731) 1 at 23.
[33] (2014) LPELR-22522. See also Jack v. University of Agriculture Makurdi (2004) 5 NWLR (Pt. 865) 208 SC; Tukur v. Government of Taraba State (1997) 6 NWLR (Pt. 510) 549 SC.
[34] Nwanwuna v. Nwaebili (2011) 4 NWLR (Pt. 1237) 290.
[35] Unilorin v. Oluwadare (2006) 14 NWLR (Pt. 1000) 751 at 768, paras. F-H.
[36] Agbaso v. Iwunze (2015) 11 NWLR (Pt. 1471) 527.
[37] Egbuonu v. B.R.T.C. (1997) 12 NWLR (Pt. 531) 29.
[38] Emeka v. Okoroafor (2017) 11 NWLR (Pt. 1577) 410.
[39] (2018) 1 NWLR (Pt. 1599) 62 at 84 para. B.

6.3 It is trite that by Section 42 of the Companies and Allied Matters Act 2020, a company has a distinct legal personality.[40] This principle flows directly from the *locus classicus* case of **Salomon v. Salomon.**[41] A corporate entity or artificial body is a juristic personality (*persona ficta)* known to law and is accorded due rights under our laws and can only act through its agents or servants who are human beings. The questions are: are the rights enshrined in Chapter IV of the 1999 Constitution applicable to or enforceable by a corporate entity or artificial body? Can a corporate entity as a corporate entity or any artificial body for that matter bring an application under the FREP Rules, 2009 for the enforcement of any of the rights guaranteed under Chapter IV of the Constitution?

6.4 Before delving into a discussion on this matter, it is important to distinguish the issue under consideration from the legal implication of paragraph 3(e) (i-v) by virtue of which a corporate entity can institute fundamental right action on behalf of a person for example its staff whose right is being threatened or is being violated or has been violated. The issue under consideration is whether fundamental rights can be enjoyed by corporate entities and if they can institute actions under the FREP Rules for the protection of "their" fundamental rights.

6.5 The answer to this question bears on the definition and nature of human rights. This conversation takes an interesting turn when it is considered that corporate entities enjoy certain rights that can conveniently be accommodated under some of the rights enumerated in Section 32-46 of the 1999 Constitution (as amended). For example, right to own property moveable and immoveable, right to freedom of expression, right to fair hearing. However, the very fact that human rights and fundamental rights are used interchangeably in the FREP Rules gives an inkling of insight as to whether corporate entities can institute actions under the FREP proceedings for the enforcement of rights that pertain to the company. **Order I (2)** defines "fundamental rights" to mean rights guaranteed under Chapter IV of the 1999 Constitution and includes rights stipulated under the African Charter on Human and Peoples' Rights while "human rights" as defined by the FREP Rules includes fundamental rights.

[40] See Abacha v. A.G Federation (2014) 18 NWLR (Pt.1438) page 31.
[41] (1897) 2 AC.

6.6 In relation to a company, it is submitted that on the authority of **FBN v. A.G. Federation (2018) 7 NWLR (Pt. 1617) 121 at 170, paras. A-G,** an incorporated entity cannot enforce fundamental rights in relation to itself. In that case, the Supreme Court, per Mary Peter-Odili, JSC affirmed as correct the decision of the Court of Appeal in **FBN v. A.G. Federation**,[42] that the 1st Appellant being an artificial person cannot maintain an action for violation of its fundamental rights as it cannot be arrested and detained. The Court of Appeal had previously granted the reliefs of the 2nd to 4th Appellants who as natural persons were unlawfully arrested and detained, but excluded the 1st Appellant as an artificial person.

6.7 It is however necessary to draw attention to the earlier position taken by the Court of Appeal in **Onyekwuluje v. Benue State Government.**[43] In that case, the respondent argued that fundamental rights do not apply to artificial persons as they are peculiar to human beings and are recognized as belonging to individuals by the very fact of their humanity. In rejecting that argument, the Court of Appeal held that since a company acts through its human agents, fundamental rights apply to it.

6.8 Notwithstanding the above decisions of the Supreme Court and the Court of Appeal, the conundrum as to the applicability of fundamental rights and its enforcement under the FREP Rules, 2009 by artificial bodies was critically examined by his Lordship, Justice Peter O. Affen of the FCT High Court in **United Bank for Africa Plc & Anor. v. FCT Commissioner of Police, Abuja & Anor., FCT/HC/M/12305/12, decided on June 21, 2012**.[44] In that case, the applicants as incorporated companies, sought to enforce their rights to acquire and own immovable property under **section 43 of the 1999 Constitution** and **Article 14 of the African Charter on Human and Peoples' Rights**. His Lordship drew a distinction between rights applicable to "every citizen" under the 1999 Constitution and "individual" under **Article 2** of the African Charter on Human and Peoples' Rights on the one hand and "every person" under the 1999 Constitution on the other hand in relation to the right to own property. The court held that the right to own property pursuant to **section 43** of the Constitution does not apply to corporate entities because the constitutional definition of every citizen implies "a natural, human

[42] (2014) 12 NWLR (Pt. 1422) 470 CA.
[43] (2005) 8 NWLR (Pt.928) 614 CA.
[44] Reported in Chief Ogwu J. Onoja, SAN, "Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedents," Bar and Bench Publishers, (2020) Vol. II p. 738.

person of Nigerian nationality and not corporate, non-human entities" and the rights enjoyed by individuals under the Charter 'implies the natural, human persons who are citizens of member states of the African Union'.

6.9 His lordship in relation to fundamental rights generally, was of the view that whether a particular fundamental right applies to a corporate entity or not depends on the nature of the right and/or language used by the makers of the Constitution when he held thus:

> **"In other words, neither s. 43 of the 1999 Constitution nor Article 14 of the African Charter contemplates non-human, corporate entities (such as the Applicants herein) in the context of the fundamental right to own and acquire immovable property. I am inclined to think that if the lawmaker intended this particular fundamental right to apply to both natural and artificial persons, they would have used the phrase *"a person"* or *"every person"* as is the case with rights such as the right to fair hearing guaranteed under s. 36 of the 1999 Constitution, or even the right to freedom of expression and the press protected under s. 39. This therefore donates the proposition that whilst some fundamental rights are for the enjoyment of both natural and artificial persons, some other rights (notably, right to life, right to dignity of human person, right to freedom of movement, right to personal liberty, right to private and family life, right to freedom from discrimination and the right to acquire and own immovable property anywhere in Nigeria) are available only to natural human persons. This dichotomy becomes imperative when it is remembered, for instance, that even if fundamental rights can be enforced by non-human persons or artificial entities as held in O*NYEKWULUJE v. BENUE STATE GOVT. supra* upon which the Applicants have heavily relied, it cannot be seriously contended that the fundamental rights such as the right to life, right to human dignity and privacy of family life, right to personal liberty, or right freedom of movement can be enforced by artificial persons. The question as to whether a particular fundamental right can be enforced by a corporate entity inevitably depends upon the nature of the right and/or language used by the makers of the Constitution."[45]**

[45] *Ibid.* p.746

6.10 The above position of Hon. Justice Peter O. Affen is novel and judicially enterprising. However, it must be noted that the proposition has not been tested on appeal.

6.11 It is humbly submitted that where the rights enshrined under Chapter IV of the 1999 Constitution are found inapplicable to artificial persons under the FREP Rules, they can take advantage of the ordinary procedure for initiating civil action, through other modes to assert and protect their rights.

7.0 MAIN CLAIM VERSUS ANCILLARY CLAIM IN FREP PROCEEDINGS

7.1 We have established that for the courts to have jurisdiction under FREP proceedings, the applicant must have a cause of action as regards the threatened violation or ongoing infringement of his or her fundamental right. In practice, it is usually the case that a particular situation contains a confluence of facts relating to different kinds of legal issues. For instance, a case of breach of contract of employment may involve breach of the right to fair hearing or a case of recovery of property might involve breach of the right to liberty if, as it sometimes happens in our clime, the landlord reports the matter to the police and the tenant is detained. Conversely, a case of breach of the fundamental right to property might touch on questions relating to trespass or title to property. In matters like these, the breach of fundamental rights can be main or derivative from another.[46]

7.2 In instances like these, it is important that a lawyer filing an action runs it through the fine comb of the principles that underpin fundamental rights proceedings so as not to be caught off-guard. One of such principle which determines if an action can be determined under the FREP Rules is whether the enforcement of fundamental rights is the main or ancillary claim in the matter. Main claim and ancillary claim were defined in **Nwali v. EBSIEC & Ors** thus:

> **"Primary or main relief in a case is one that is not dependent on any other relief claimed therein for its determination. It relates**

[46] Ihim v. Maduagwu (2021) 5 NWLR (Pt.1770) 584 at 623 paras. E-G.

to a central or primary question in the case. An incidental or secondary relief is one that is dependent on another relief for its determination and deals with the questions arising from the primary question."[47]

7.3 In fundamental rights proceedings under the FREP Rules, a court will only have jurisdiction to hear and determine the matter if the main claim is for the enforcement of fundamental rights. In **Ihim v. Maduagwu** the Supreme Court held:

> **"For a matter instituted under the Fundamental Rights (Enforcement Procedure) Rules, as constitutionally guaranteed rights under Chapter IV if the Constitution of the Federal Republic of Nigeria, 1999 (as amended) the enforcement of such rights(s) must be the main/substantive claim before the court, not ancillary."**[48]

In **FCMB Plc v. Nyama**, the Court of Appeal held thus:

> **"Now it is settled that where an application is made under the Fundamental Right (Enforcement Procedure) Rules, a condition precedent to the exercise of the court's jurisdiction is that the enforcement of fundamental rights of the securing of enforcement thereof should be the main claim and not the accessory claim. Where the main or principal claim is not the enforcement of a fundamental right, the jurisdiction of the court cannot be properly exercised under Fundamental Right (Enforcement Procedure) Rules. The Rules are specifically restricted only to actions on contravention of the provisions of Chapter IV of the Constitution. Thus, only actions founded on a breach of fundamental rights guaranteed in the Constitution of the Federal Republic of Nigeria can be enforced under the Fundamental Rights (Enforcement Procedure) Rules and where an applicant under the Fundamental Rights (Enforcement Procedure) Rules is unable to pigeon hole his complaint within any of the guaranteed fundamental rights, the jurisdiction of the court cannot be said to be properly invoked**

[47] (2014) LPELR – 23682 (CA)
[48] (Supra) 584 at 623 paras. E-F.

and the action is liable to be struck out on the ground of incompetence."[49]

7.4 Similarly, where the main claim cannot be validly presented under **section 46 of the 1999 Constitution**, the court would have no jurisdiction to hear or grant any order in the matter and cannot handle the ancillary claim even if it involves breach of human rights. In **Ezeanochie v. Igwe**, the Supreme Court in holding that a matter wherein the principal relief centered on the payment of security levy held thus:

> **"Where an alleged breach of fundamental rights is ancillary or incidental to the substantive claim, it will be incompetent to constitute a claim of enforcement of fundamental right."**[50]

WAEC v. Adeyanju, the Supreme Court held thus:

> **"A party seeking relief under *section 46(1) of 1999 Constitution* and *Order 1 Rules 2* & 3(1) of Fundamental Rights (Enforcement Procedure) Rules must ensure that the main relief and consequential reliefs point directly to a Fundamental Right under *Chapter IV of the 1999 Constitution* and a clear deprivation of the same by the other party being sued."**[51]

7.5 The provisions of **section 46(1)** are very clear as they donate powers to the court to deal with matters covered by **sections 33 – 46 of the 1999 Constitution**. The question as to whether an action for the enforcement of fundamental is the main or ancillary claim necessarily touches on the jurisdiction of the court. It is trite that a court is not competent to entertain any matter except all the conditions precedent to the exercise of its powers or jurisdiction are fulfilled. A condition precedent to bringing an application under the FREP Rules is that the right sought to be enforced is one provided for under Chapter IV of the 1999 Constitution or African Charter. For a claim to qualify as falling under fundamental rights, it must be clear that the principal relief is for the enforcement or for securing the enforcement of a

[49] (2014) LPELR-23973 at 19-20, paras. E-A. See also Amale v. Sokoto Local Government (2012) 5 NWLR (Pt. 1292) 181 SC.
[50] (2020) 7 NWLR (Pt.1724) 430 at 462 paras G.
[51] (2008) 9 NWLR (Pt. 1092) 270 at 295-296, paras. G-D. See also Unical v. Ugochukwu (supra); Iheanacho v. NPF (2017) 12 NWLR (Pt. 1580) 424 CA.

fundamental right and not from the nature of the claim, to redress a grievance that is ancillary to the principal relief, which is in itself not a claim of fundamental right.

7.6 In other words, where the alleged breach of a fundamental right is ancillary or incidental to the substantive claim in civil or common law matters, it is incompetent to constitute the claim as one for the enforcement of fundamental rights. Therefore, where the fundamental rights sought to be enforced is not the main relief and the main relief is not in Chapter IV, the court will lack jurisdiction to entertain the action.[52]

7.7 It is important to stress that in view of the expanded jurisdiction under the FREP Rules, 2009 by the inclusion of African Charter on Human and Peoples' Right (Ratification and Enforcement) Act and other international conventions in an applicant can file an action under the FREP Rules, 2009 claiming reliefs in respect of the rights contained in the African Charter as well as other international treaties.[53] It is therefore follows that under the FREP Rules, the courts will only have jurisdiction to determine a matter only when the main claim for the enforcement of any of the fundamental rights enumerated under Chapter IV of the 1999 Constitution, the African Charter on Human and Peoples' Rights and validly domesticated international treaties and conventions.

8.0 LIMITATION LAWS AND FREP PROCEEDINGS

8.1 It is a testament to the primacy of fundamental rights that in enacting the FREP Rules, 2009, the Chief Justice of Nigeria included Order III which makes the various limitation laws operating in our civil litigation domain inapplicable to FREP proceedings. Order III Rule 1 of the FREP Rules, 2009, provides thus:

> **"An Application for the enforcement of Fundamental Right shall not be affected by any limitation Statute whatsoever."**

8.2 This provision is a stark deviation from the legal regime under the FREP Rules, 1979 which provided that an application for leave for the enforcement of fundamental rights must be brought within 12 months of the violation or threat. Order II Rule 1 of the FREP Rules, 1979. The application of limitation

[52] See FRN v. Ifegwu (supra); Iheanacho v. NPF (supra).
[53] See paragraphs 3(a)(b) and (c) of the preamble and Order II Rule 1 of the FREP Rules, 2009.

law to FREP proceedings under the 1979 Constitution no doubt created hardship as many cases were declared incompetent because they were adjudged to have been commenced outside the limitation period of 12 months provided under the FREP Rules, 1979. In **Egbe v. Adefarasin**,[54] an application for leave to enforce the applicant's right to personal liberty was refused on the ground that the action was brought 30 months after the alleged infringement.[55] However even under the 1979 FREP Rules, certain forward thinking judges frowned upon the application of limitation period to fundamental rights proceedings holding that same was inconsistent with the provisions of the Constitution.

8.3 In order to have a deeper grasp of the implication of Order III, it is necessary to examine the jurisprudential basis for limitation law. The essence of limitation laws is summed up in the well known maxim of equity: Equity favours the vigilant and not the indolent.[56] In **Omueti v. Uni Uyo,** it was held thus:

> **"The raison d' etre for limitation law are to ginger up aggrieved persons to be vigilant, to discourage cruel actions, to preserve the evidence by which a defendant will defend the action and to satisfy the public policy that there should be an end to litigation."**[57]

8.4 In Nigeria we have many limitation laws. These limitation laws are not only tied to time but also previous acts of a party, previous decisions of courts, and any other issues which will make it inequitable or unconscionable to allow a claimant to activate the jurisdiction of the court. It is for these various limitations, both in law and equity, that **Order III** refers to "any limitation statutes whatsoever". There are different limitations for different classes of action under Limitation Act and Laws in Nigeria and also limitation in equity. The major Limitation Statutes in Nigeria are:

1. Limitation Act
2. Limitation Laws of the States
3. Public Officers Protection Act

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[54] (1987) 1 NWLR (Pt. 47) 1 SC.
[55] See also Akanbi v. Gnagnatun (1984) 5 NCLR 722.
[56] Jerry Amadi "Limitation of Action: Statutory and Equitable Principles" Vol. I, Pearl Publishers, (2011), p.41-58.
[57] (2019) LPELR – 47155 (CA)

8.5 In keeping with the overriding principles and the spirit of the FREP Rules, 2009 as espoused in the preamble, the limitation period contained in the FREP Rules, 1979 was expunged thus setting the enforcement of fundamental rights free from the constraints and effect of the various limitation laws such that fundamental rights enforcement proceedings can be instituted at any time regardless of the time the infringement took place. This piece of innovation no doubt has given added impetus and verve to the enforcement of fundamental rights in Nigeria and has practically elevated the FREP Rules, 2009 into the highest echelons in the hierarchy of our laws secondary only to the Constitution. This innovation is much appreciated when considered against the backdrop of the fact that under the various limitation laws, the application of the time bar is so strict that once a case is caught by the limitation law, the courts cannot extend the time for the commencement of the suit[58] and no matter its merit the court will decline jurisdiction to hear and determine the suit.

8.6 The provision of **Order III** hereof received judicial imprimatur in **F.U.T. Minna v. Olutayo**, where the Supreme Court, per Eko, JSC, emphasised the superiority of the FREP Rules, 2009 over all other laws including **section 2(a)** of the Public Officers Protection Act by holding that:

> **"In any case the respondent's right to enforce fundamental right to fair hearing is one specially vested by section 46(1) of the 1999 Constitution and the Fundamental Rights (Enforcement Procedure) Rules. I hold that the right to enforce fundamental rights stands above the ordinary laws, including section 2(a) of the Public Officers Protection Act…."[59]**

Also, in **El-Rufai v. Senate of the National Assembly**, the Court of Appeal held thus:

> **"This point has been made clear and plain by Order 3 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 which came into force on the 1st day of December 2009. Order 3 of the said Rules provides that: 'an application for the enforcement of fundamental rights shall not be affected by any**

[58] See Nwanze v. NRC (2022) 18 NWLR (Pt.1862) 265 at 288 and Oko v. A.G. Ebonyi State (2021) 14 NWLR (Pt. 1795) 63 at 102 paras B-C.

[59] (2018) 7 NWLR (Pt. 1617) 176 at 196, paras. B-C.

limitation statute whatsoever. It is clear from all that I have stated above, that the appellant's application for the enforcement of his fundamental rights was not statute barred either under section 2(a) of the Public Officers Protection Act or any other statute of limitation.' I am of the humble view that no limitation statute or law, for example the public officers' protection Act or law can be invoked by any litigant to cause a court of law and justice to decline jurisdiction when the cause or matter in controversy involves fundamental or human rights of an aggrieved person as occurred in the lower court."[60]

8.7 The inapplicability of limitation law by virtue of Order III of the FREP Rules, 2009 has elicited criticism from certain quarters. Jerry Amadi, in his book, "Limitation of Action: Statutory and Equitable Principles", page 1462, set down the following criticism thus:

"…abolition of all forms of time-limiting factors from the 2009 Rules, makes the Rules one piece of dangerous legislation. By not requiring a time limit, the Rules have resurrected the mischievous spirits which limitation statutes have buried over the ages. The dangerous character of the new legal order can only be deciphered by critically examining the rationale behind limitation statutes."

8.8 In critiquing Order III, I have also probed as to whether the Chief Justice of Nigeria can make a sweeping provision such as Order III which totally renders as inapplicable 'any limitation statute whatsoever' to proceedings under the FREP Rules, 2009. In other words, can the Chief Justice of Nigeria by whatever guise or pretext, acting alone in the comfort of his hallowed and majestic chambers, in his administrative capacity, and by a stroke of his pen, make rules that will override the effect and validity of a Federal Statute passed by a majority of elected National Assembly?[61]

8.9 One argument in support of the action of the Chief Justice of Nigeria is that the FREP Rules, 2009 were made by the Chief Justice of Nigeria pursuant to powers conferred on him by section 46(3) of the 1999 Constitution and

[60] (2016) 1 NWLR (Pt. 1494) 504 at 535, paras. A-C; 543-544, paras. H-A. See also Yemtet v. FUNAAB & Anor. (2016) LPELR-43815 CA.

[61] Chief Ogwu J. Onoja, SAN, "Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedents," Bar and Bench Publishers, (2020) Vol. I, p. 158

therefore for this reason, the FREP Rules, 2009 are deemed to be at the same level with provision of the Constitution and superior to other laws in the pyramid of laws in Nigeria. Femi Falana, SAN in his book "Fundamental Rights Enforcement", at page 16 opined that, although the FREP Rules were made subject to the provision of **section 42(3) of the 1979 Constitution**, now **section 46(3) of the 1999 Constitution**, they are deemed to be at par with the provision of the Constitution and as such higher than other laws in the hierarchy of superiority of laws in Nigeria. That, in the case of any inconsistency between the FREP Rules and any other law, the FREP Rules will prevail. In **Anozie v. I.G.P.**,[62] the Court of Appeal held that the FREP Rules is a law and not simply a rule of court procedure. Fundamental rights are not ordinary rights, they are constitutionally guaranteed and therefore of great significance. They are regarded as inalienable rights which cannot be infringed without a breach of the fundamental law of the land as enshrined in the Constitution which recognises such rights, the encroachment of which are rigorously tested by courts to ascertain justification.[63]

8.10 The above position no doubt stems from the pre-eminence given to fundamental rights as the core constitutional right recognized by the constitutions of many liberal democracies around the world including the 1999 Constitution of the Federal Republic of Nigeria (as amended). However, it is my humble submission that the the FREP Rules are rules of court and in the same category like other rules of courts such as the Supreme Court Rules, 2008 as amended made by the Chief Justice of Nigeria pursuant to powers conferred on him by the Supreme Court Act and section 236 of the 1999 Constitution (as amended), the Court of Appeal Rules, 2016 enacted by the President of the Court of Appeal pursuant to the Court of Appeal Act 1976, as amended and **section 248 of the 1999 Constitution, t**he Federal High Court Rules, 2019 enacted by the Chief Judge of the Federal High Court pursuant to the Federal High Court Act, 1973 and **section 254 of the 1999 Constitution**.

8.11 It is humbly submitted that, the fact that these court rules were made subject to provisions of the Constitution did not make them equal or superior to other "existing laws" under the Constitution as the existing laws are part and parcel of the Constitution. With the greatest respect to the office of the Chief Justice of Nigeria, his powers pursuant to **section 46(3) of the 1999 Constitution** to

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[62] (2016) 11 NWLR (Pt. 1524) 387 at 404.

[63] Chief Ogwu J. Onoja, SAN, "Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedents," Bar and Bench Publishers, (2020) Vol. I, p. 158-160

make rules for the application of the FREP Rules, 2009 cannot be elevated to power and prerogative to administratively review and or void a statute enacted by the National Assembly. The power to enact and abrogate a validly enacted statute is neither vested in nor exercisable by the Chief Justice of Nigeria by an administrative stroke of pen. The statutory perquisite to make laws is exclusively vested in the National Assembly under **section 4 of the Constitution** and the courts in their adjudicative and interpretative powers under **section 6 of the Constitution**.

8.12 It is further submitted with all humility, that FREP Rules as rules of court cannot be superior to statutes like the Limitation Act and all laws prescribing pre-action notices.[64]

9.0 CONSOLIDATION AND JOINT APPLICATIONS IN FREP PROCEEDINGS

9.1 Another subject of practical importance discussed in the book is the issue of consolidation and joint applications in FREP proceedings. This subject at face value looks simple and uncomplicated for most practicing lawyers who are versed in instituting matters in court. However, in the light of certain peculiar legal nuances contained in the wording of section 46(3) of the 1999 Constitution (as amended) this subject particularly that of joint applications involves some intricacies which can have serious ramifications if a lawyer institutes an action without paying attention to them. This subject will be explored by separately examining the two arms of the subject matter herein under consideration.

(i) Consolidation of Action Under FREP Rules, 2009

Order VII Rule 1 of the FREP Rules, 2009 provides for consolidation of several applications thus:

> **"The Judge may on application of the Applicant consolidate several applications relating to the infringement of a particular Fundamental Right pending against several parties in respect of the same matter, and on the same grounds."**

[64] *Ibid*. p.161-162

This provision is meant to inject efficiency in the way FREP proceedings are handled in court by saving cost and avoiding multiplicity of suits which in some instances can lead to abuse of court process. Generally, consolidation of several suits is recognized and permissible under our laws because of its utilitarian value in saving the time of the courts. It is therefore not far-fetched that the FREP Rules, 2009 should contain provisions dealing with consolidation of several applications. This is in tandem with paragraph **3(f)** of the preamble which enjoins the court to pursue speedy and efficient enforcement and realization of human rights. Similarly **Paragraph 2 of the preamble** places a burden on parties and their legal representatives to assist the court in furthering the overriding objectives of the rules which according to **paragraph 3(a) and (b)(i) and (ii) of the preamble,** is to ensure that the provisions of the Constitution especially Chapter IV as well as the African Charter are expansively and purposely interpreted and applied in ways that advance the realization of the rights, freedoms and protection contained in them.

Thus, the courts, parties and their legal representatives are to work in concert to see to it that fundamental right cases are quickly determined. It is in this regard that the provisions on consolidation of several applications becomes important. Generally - and this is applicable to FREP proceedings as is evident from Order VIII - before consolidation is granted there must be certain conditions common to several suits which necessitates that they should be consolidated. In **Ngere v. Okuruket 'XIV',** the Supreme Court distilled the conditions necessary for several matters to be consolidated and held that**:**

> **"Thus, consolidation of suits/cases is generally made for expediency and convenience such that suits/case having same and common characteristics of law or facts arising from common transaction may be heard and determined at the same time in order to avoid multiplicity of actions and economise time and costs. See Ifediorah v. Ume (1988) 2 NWLR (Pt.74) 5. However, where from the nature of the claims, the issues and the constitution will cause confusion to the question(s) in controversy or will cause embarrassment or injustice to one of the parties, it will not be ordered. This principle holds true even where the parties have consented to the consolidation."**[65]

[65] (2015) 15 NWLR (Pt. 1482) 392 SC.

Under the FREP Rules, 2009 practical guidance is given under Rules 2 and 3 of Order VII**.** Rule 2 provides that where several applications are pending before different judges, the Applicant must first apply to the Chief Judge of the Court for re-assignment of the matter to a judge before whom one or more of the matters are pending. Rule 3 on the other hand provides that The Applicant must show that the issues are the same in all the matters before the application for consolidation may be granted by the Court.

This means that an applicant must first of all bring to the attention of the Chief Judge of the court the fact that several cases emanating from the same transaction and having the same claim or questions for determination are pending before several judges and that these matters should be re-assigned to a judge before whom one or more of these matters are pending so that all such matters can be before the same judge. The application to the Chief Judge for re-assignment is necessary because one of the administrative functions of a Chief Judge is the assignment and re-assignment of cases. It is after this application to the Chief Judge for re-assignment has been made and granted that the provision of Rule 3 comes into operation.

In applying to the judge for consolidation under Rule 3, an applicant who desire the judge to exercise his discretion in his favour must ensure that his affidavit contains facts which satisfy the conditions necessary for consolidation which are distilled thus:

a. The actions or applications for enforcement of fundamental rights must be pending in the same court;

b. There exist common questions of law or fact bearing sufficient importance in proportion to the rest of the subject matter(s) of the applications to render it desirable that all the applications sought to be consolidated be disposed of at the same time;

c. The same common questions of law or fact in each of the applications can conveniently be disposed of in the same proceeding;

d. The right to reliefs claimed in each application arises out of the same transaction; and/or

e. Any other reason which makes it desirable for the court to order consolidation.[66]

The practical implication of consolidated suits is that separate decisions in respect of the issues will be delivered by the court and in doing this the court must avert its mind to all the issues canvassed before it. This principle was aptly expressed in **INEC v. Nyako**, where the Court of Appeal, per Garba, JCA, held thus:

> **"I have at the early stage of this judgment stated why the courts adopted the practice of consolidation of suits and the principle of law that suits consolidated do not lose their distinct and separate identities by the fact of the consolidation. Such suits retain their identities for the purpose of hearing and determination."[67]**

(ii) Joint Applications Under FREP Proceedings

As earlier pointed out, joint applications are a potential banana peel which lawyers instituting fundamental rights actions must be careful to avoid. While joint applications are permissible under general civil litigation, it is important to stress that there is no provision for joint applications under the FREP Rules, 2009. What the FREP Rules, 2009 provides for is consolidation of several applications. The distinction between consolidation of several applications and joint applications lies in the fact that while consolidation pertains to several suit sharing common features being consolidated for hearing before a single judge - or in the case of appeals before a single panel – joint applications refers to instances where several applicants jointly file an originating process with all of them as parties. This is not permissible under the FREP Rules.

The reason why joint applications are not countenanced under the FREP Rules, 2009 is not far-fetched from the fact that the fundamental rights provided in the Constitution are personal and pertain to the individual. The Constitution makes no provision for the fundamental rights of groups or any collective number of people. This can be seen in section 46(1) of the Constitution which is worded in a manner which expresses the singular and personal nature of fundamental rights thus:

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[66] Chief Ogwu J. Onoja, SAN, "Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedents," Bar and Bench Publishers, (2020) Vol. I, p. 247-248.
[67] (2011) 12 NWLR (Pt. 1262) 439 at 533, paras. A-B.

> **"<u>Any person</u> who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State in relation to him may apply to the High Court in that State for redress."**

This was the view taken by the Court of Appeal in **Kporharor & Anor. v. Yedi & Ors.**[68], wherein it held thus:

> **"In this appeal under consideration, the application was brought by two separate Applicants (1) Mr. Michael Yedi and (2) Onodje Yedi Nig. Ltd. The words used under Section 46(1) of the Constitution set out above is very clear. The same provision is made in Order 1 Rule 2(1) of the Fundamental Rights (Enforcement Procedure) Rules, 1979. The adjective used in both provisions in qualifying who can apply to a Court to enforce a Right is any which denotes singular and does not admit pluralities in any form. It is individual rights and not collective rights that is being talked about. In my humble view, any application filed by more than one person to enforce a right under the Fundamental Rights (Enforcement Procedure) Rules is incompetent and liable to be struck out."**

The above decision was reaffirmed by the Court of Appeal, per Steven Jonah Adah, JCA in **Udo v. Robson & Ors.**, when he held thus:

> **"The contention of learned Counsel for the Respondents that it is proper in law for two or more persons to apply jointly for the enforcement of their fundamental rights cannot be sustained. The decision of this court in KPORHAROR case (supra) is the current decision of this Court. By the doctrine of stare decisis I am cound by the earlier decision of this Court. I cannot in anyway deviate from it. I hold in the circumstance that it is not proper to join several Applicants in one application for the purpose of securing the enforcement of their fundamental rights."**[69]

What then should a lawyer do when he or she is faced with a situation

[68] (2017) LPELR-42419 CA.
[69] (2018) LPELR-45183 at 13-25, paras. C-A.

where several persons suffer the breach of their fundamental rights say for instance a group of young men are unlawfully arrested and detained by the police in violation of their fundamental right to freedom? It is my humble suggestion that in the light of the issues examined herein, the wisest course of action a lawyer should take is to file the actions separately and thereafter take advantage of Order VII and apply to the Chief Judge for the re-assignment of the several applications and subsequently file a motion for the consolidation of these cases before a single judge.

10.0 POWER OF THE POLICE AND LAW ENFORCEMENT AGENCIES TO CARRY OUT THEIR STATUTORY FUNCTIONS VIS-A-VIS THE ENFORCEMENT OF FUNDAMENTAL RIGHTS

10.1 One of the foremost function of the Nigerian State is the protection of lives and property. The importance of this function is borne out of the fact that it is a constitutional imperative contained in section 14(2)(b) of the 1999 Constitution. In carrying out this function, the Constitution created government agencies such as the police and gives the National Assembly the power to make laws creating agencies like the Economic and Financial Crimes Commission, Nigerian Immigration Service, Nigerian Customs Service etc which all comprise the security architecture of Nigeria.

10.2 Just as the Nigerian state has a constitutional duty to protect lives and property, it also has the duty to uphold the fundamental rights enshrined in **sections 33-45 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)** as well as rights enunciated in other international fundamental rights treaties. This is particularly the duty of the judiciary as a bastion in ensuring that the rights of citizens are not violated by State and Non-State actors.

10.3 Thus there is a friction between these two functions of the state and the police and other security agencies are usually made to walk the tight rope between these two constitutional mandates in the course of carrying out their functions of protecting lives and property, fighting corruption and preventing economic sabotage of any kind.

10.4 All the Security agencies in Nigeria are creatures of statute with their powers clearly spelt out in the various statutes that established them. The Nigeria Police Force for instance is a creature of both the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the Police Act, 2020

Section 214(1) of the Constitution provides thus:

> **"There shall be a police force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provisions of this section no other police force shall be established for the Federation or any part thereof."**

In the same vein, **section 3 of the Police Act** provides:

> **"There shall be established for Nigeria a police force to be known as the Nigeria Police Force (in this Act referred to as "the Force")."**

10.5 One of the functions or powers of the Police is the investigation of crimes. This particular power is among others contained in **section 4 of the Police Act**. It provides thus:

> **"The Police shall be employed for the prevention and detention of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and shall perform such military duties within or outside Nigeria as may be required of them by, or under the authority of this or any other Act."**

10.6 The Economic and Financial Crimes Commission (EFCC) on the other hand is a statutory body established pursuant to **section 1(1) of the Economic and Financial Crimes Commission (Establishment) Act[70].** The Commission is the designated financial intelligence agency of Nigeria saddled with the responsibility to investigate and prosecute economic and financial crimes as well as coordinating the various institutions involved in the fight against corruption and the enforcement of all laws dealing with economic and financial crimes in Nigeria. In carrying out investigation, the Police and other

[70] Cap E1, LFN, 2004.

security agencies have the duty to investigate the case not only against the person about whom the complaint has been made, but also against any person who may have taken part in the commission of the offence.[71]

10.7 The question is: Can proceedings instituted for the enforcement of fundamental rights be a bar to the powers of the police to carry out their statutory functions? The answer to this can be seen in a number of decisions where our courts have drawn a fine line between the need for the police and other security agencies to carry out their functions without any hindrance and the need for them to respect or avoid violation of fundamental rights in the course of carrying out their functions.

10.8 The courts therefore do not lean in favour of a suspect or any one who proceeds to court to restrain the Police or the EFCC from investigating a crime or prosecuting a crime. This is because the courts do not have the jurisdiction to restrain the Police or the EFCC from carrying out their constitutional and statutory functions. In **I.G.P. v. Ubah**, the Court of Appeal, per Iyizoba, JCA held thus:

> **"For a person, therefore to go to court to be shielded against criminal investigation and prosecution is an interference with powers given by the Constitution to law officers in the control of criminal investigation…. It is indeed trite that no court has the power to stop the Police from investigating a crime and whether to or how it is done is a matter within the discretion of the Police."[72]**

In **Kalu v. FRN,** the Supreme Court, per Galadima, JSC held thus:

> **"Sections 6(m) and 46 of the Economic and Financial Crimes Commission (Establishment) Act vests in the EFCC the function and duty of investigating and prosecuting persons reasonably suspected to have committed economic and financial crimes. For a person to rush to court to place a clog or shield against criminal investigation and prosecution is a clear interference with the powers given by law and the constitution**

[71] See Onyekwere v. The State (1973) 8 NSCC 250 at 255.
[72] (2015) 11 NWLR (Pt. 1471) 405 at 433, paras. A-C. See also, Salihu v. Gana (2014) LPELR-23069 CA.

to EFCC in the conduct of criminal investigation and prosecution."[73]

10.9 Thus, while upholding the powers of the police to carry out their statutory functions, the courts have not closed their eyes in ensuring that the security agencies exercise their powers within the limits and in accordance with the provisions of the law. For instance, section 35(4)(a) and (b) of the 1999 Constitution (as amended) provides that any person who is arrested or detained must be brought before a court of law within a reasonable time and where such a person is not tried within two months for a person who is in custody or three months for a person who is on bail, such a person shall be released unconditionally or upon such terms as to ensure that the person appears in court for trial at a later date. In **Danfulani v. EFCC**, it was held thus:

"In investigating any complain, the 1st respondent, is bound to observe the provisions of the Constitution in which it is stated in section 35 as follows:
Section 35 of the Constitution of the Federal Republic of Nigeria 1999 –

1. **Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law –**

c. **for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence."**[74]

10.10 It is in this regard that instances of abuse of fundamental rights by the security agencies under the guise of carrying out their function has been resisted by the courts. For instance, it is forbidden under our laws for proxy arrest to be effected by the police. **Section 7 of the Administration of Criminal Justice Act, 2015** provides that:

"A person shall not be arrested in place of a suspect."

[73] (2016) 9 NWLR (Pt.1516) 1 at 19-20, paras. G
[74](2016) 1 NWLR (Pt.1493) 223 at 246-247, paras. G-B

This is a codification of the principles espoused per Tobi, JCA (as he then was) in **A.C.B. v. Okonkwo**, wherein his lordship held thus:

> **"I know of no law which authorizes the police to arrest a mother for an offence committed or purportedly committed by the son. Criminal responsibility is personal and cannot be transferred. While I am aware of cases of vicarious liability in criminal law, the instant case is certainly not one. A police officer who arrests 'A' for the offence committed by 'B' should realise that he has acted against the law. Such a police officer should, in addition to liability in civil, be punished by the Police Authority. As a matter of fact, it bothers us so much for the Police operating the law of arrest after three decades of Nigeria's independence to arrest and detain innocent citizens of this country for offences committed by their relations. That is a most uncivilised conduct and one that any person with a democratic mind should thoroughly detest and condemn. I detest and condemn the uncouth practice."**[75]

10.11 Thus, the police are obliged to carefully observe strict adherence to operational guidelines which protect the rights of persons who are under investigation or who have been arrested and detained or under custody. Therefore, in as much as the police and other security agencies cannot be stopped from carrying out their statutory functions, their powers are not unfettered such that it can be applied indiscriminately. In **I.G.P. v. Ubah**[76]**,** the Court held thus:

> **"…if in the course of investigation of a criminal offence, the Police fall foul of any of the provisions of section 35 of the Constitution of the Federal Republic of Nigeria, 1999 (right to personal liberty) or indeed any other relevant statute, their action can be challenged in an action under the Fundamental Rights Provisions or by ordinary writ of summons."**

10.12 Finally, the security agencies are to ensure that they screen the matters that they get involved in so that they operate only within the confines of their

[75] (1997) 1 NWLR (Pt. 480) 194 at 207-208, paras. H-B.
[76] (supra) at 439, paras. B-C.

statutory functions. The point is that the police and other security agencies are not to get involved in civil matters that are commercial in nature and which portend no security threat. In **Diamond Bank v. Opara,** the Supreme Court, per Bage, JSC held thus:

> **"It is important for me to pause and say that the powers conferred on the 3rd respondent, i.e. the EFCC to receive complaints and prevent and/or fight the commission of Financial Crimes in Nigeria pursuant to section 6(b) of the EFCC Act (supra) does not extend to the investigation and/or resolution of disputes arising or resulting from simple contracts or civil transactions in this case."**[77]

11.0 DEROGATION AND LIMITATION OF FUNDAMENTAL RIGHT UNDER THE 1999 CONSTITUTION

The fundamental rights guaranteed under Part IV of the 1999 Constitution (Sections 33 – 44) is not absolute. The same laws treaties and conventions that created these rights also stated their limitations and condition precedents.

Thus, your fundamental rights to free movement and to life will not avail you if you commit crime, tried and convicted.

Derogation, according to the Blacks Law Dictionary, Seventh Edition, page 455 refers to:

> **"The partial repeal or abolishing of a law, as by a subsequent Act which limits its scope or impairs its utility and force. While limit in law simply means to abridge, confine and restrict."**

Thus, there is constant tension between the rule of law, respect for fundamental rights, and national interest. This tension is however moderated by the interposition of the law between individual rights and the interests of the larger community as the Constitution itself sets the limits to the application of fundamental rights by creating exceptions to its application in certain situations.

[77] (2018) 7 NWLR (Pt.1617) 92 at 114, paras. B-C.

Consequently, an applicant for enforcement of fundamental rights under Chapter IV of the Constitution may not be so entitled if the alleged violation complained of falls under any of the exceptions provided thereunder. In such a circumstance, where derogation or limitation is placed on the strict adherence to the fundamental rights, such rights cease to be absolute.

There are many exceptions or limitations to the enforcement of fundamental rights under the 1999 Constitution. For instance, section 45(2) of the 1999 Constitution allows derogation from the rights guaranteed under Chapter IV of the Constitution thereof. An applicant for enforcement of fundamental rights under section 35 of the Constitution will be limited by the provisions of subsections (1)(a)-(f) and 7(a) (b) for every right provided under Chapter IV. There are other exceptions regulating their applicability. Some examples of these restrictions, limitations, or derogations are sections 33(2) (a)-(c), 34(2) (a)-(e)i-iii, 36(a) (b), 38(3), 42(3) and 44(2) (a)–(m).

It must be understood that sections 33, 34, and 35 contain their own exceptions and limitations for the various rights enunciated therein, while section 45 on the other hand deals with instances where the National Assembly can legislate to curtail rights guaranteed under sections 37 to 41. This analysis focuses on the exceptions under sections 33, 35, 41, and 45 in demonstration of the principle of derogation.

This position of the law was examined by the Court of Appeal in IGP v. Ikpila (2016) 9 NWLR (Pt. 1517) 236 at 286-287, paras. C-B, where it held thus:

> **"The right to life is sacred and sacrosanct. It is the highest and the most important of all the fundamental rights guaranteed by section 33(1) in Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which provides that every person has a right to life, save in execution of the sentence of a court in respect of a criminal offence for which he has been found guilty in Nigeria. Every citizen of Nigeria is entitled to his life and which shall not, save as permitted by the law, be deprived or snuffed out of him. Every taking or deprivation of the life of a citizen by another is illegal, unlawful and unconstitutional save if it is lawfully justified or excused by law within the exceptions expressly provided for in section 33(2) of the Constitution which provides that a person shall**

not be regarded as having been deprived of his life in contravention of the section if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary:

a. For the defence of any person from unlawful violence or for the defence of property;
b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
c. For the purpose of suppressing a riot, insurrection or mutiny."

In Amoshima v. State (2011) 14 NWLR (Pt. 1268) 530 at 555, paras. F-G, the Supreme Court held that:

> **"…the right to life as provided under the Nigerian Constitution is qualified - not absolute. Though section 33(1) of the 1999 Constitution guarantees the right to life of everyone, it equally legally permits the deprivation of life in execution of the sentence of a court of law in respect of a criminal offence, such as armed robbery for which the person has been found guilty."**

12.0 THE PLACE OF VIRTUAL OR REMOTE HEARINGS IN FUNDAMENTAL RIGHTS PROCEEDINGS.

12.1 In the wake of the COVID -19 pandemic and the disruption occasioned by it with respect to lockdowns, global closure of public institutions including the courts, social distancing and limits to public gatherings, various heads of courts in Nigeria issued practice directions aimed at ensuring that court proceedings took place even in the face of the constraints imposed by the pandemic. For instance, the Chief Judge of the Federal High Court, his lordship, Hon. Justice J.T. Tsoho, pursuant to his powers under **section 254 of the 1999 Constitution**, **section 44 of the Federal High Court Act, Order 57 Rule 3 of the Federal High Court (Civil Procedure) Rules, 2019**, by an instrument dated 18th May, 2020 issued the "Federal High Court of Nigeria Practice Direction 2020 for the COVID-19 Period", providing protocols for safe delivery of justice in all the judicial divisions of the Federal High Court. Similar practice directions were issued by the President of the National Industrial Court and the Chief Judge of the Federal Capital Territory.

12.2 An interesting aspect of the various Practice Directions with patent constitutional implication is the window of opportunity created for courts to conduct their proceedings remotely or virtually. This elicited mixed reactions from lawyers and judges as to whether the issue of remote or virtual court proceedings infringes upon **section 36(3) and (4) of the 1999 Constitution** of the Federal Republic of Nigeria (as amended).

12.3 Even though we have since come out of the shadows of the COVID-19 pandemic and the practice directions issued by the heads of the various courts have become inoperative, there is no doubt that the issue of virtual or remote proceedings is a contemporary subject which requires examination.

12.4 One effect of the COVID-19 pandemic that has lingered and which may be considered a legacy of the pandemic is the deployment of virtual meetings in place of physical meetings. Although virtual meetings were conducted prior to the pandemic, it became mainstream during the pandemic and unlike other effects such as the wearing of masks, use of hand-sanitizers, limits on public gatherings etc which have been jettisoned, virtual meetings have continued to be utilized by medical doctors, business and commercial entities, corporations, arbitrators and courts in conducting their affairs. It is therefore imperative that we examine the implications of virtual court proceedings as it pertains to fundamental rights proceedings in Nigeria.

12.5 Virtual or remote proceedings is a proceeding of court that is conducted by the use of technology via the internet where parties, their lawyers and indeed members of the public do not need to sit in a room or a designated place. Here, the basic function of adjudication is conducted with parties and their counsel being afforded opportunities to be heard remotely. In a virtual or remote court proceedings, the need to converge in one room by all concerned for the purpose of judicial exercise is totally dispensed with. In a nutshell, it is court proceedings through the use of internet with the help of electronic devices like computers, televisions, tablets, smart phones, etc. Virtual court proceedings are fast and efficient and barring the occasional technical glitches, they offer the same result as physical court proceedings in terms of justice delivery.[78]

12.6 But the niggling question is: are virtual court proceedings constitutional? Our laws forbid secret trials and in this regard all court proceedings are to be

[78] Chief Ogwu J. Onoja, SAN, "Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedents," Bar and Bench Publishers, (2020) Vol. II, p. 507

conducted in public. Section **36(3) of the 1999 Constitution** of the Federal Republic of Nigeria (as amended) contains the stipulation with regard to public trials. **Section 36(3)** provides thus:

> **"(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of a court or tribunal) shall be held in *public.*"**

12.7 The term "public" is not defined in the Constitution. Therefore, to decipher whether virtual or remote court proceedings qualifies as public place, the contemporary meaning of those terms must be known.

"Public"- **The Black's Law Dictionary**[79] defines the word public thus:

> **"A place open or visible to the public; <u>open and available for all to use, share or enjoy</u>**". (Underlined for emphasis)

12.8 For a court proceeding to qualify as one held in the public, it must be seen by all those who desire to witness it to have taken place either in an open court room or any other place the judge sits to carry out his judicial functions**.** The underlining factor is that it must be seen to have been done or taken place. The rationale behind the use of the word "public" in the Constitution as a measure of fair hearing is solely a situation where the public is afforded the opportunity to make a fair assessment of the trial in court whether criminal or civil. This underscores the basis upon which the word "public" appears in **section 36 of the Constitution** which deals with fair hearing generally.

12.9 Thus even though the word 'public' was not defined in the Constitution, the innovation brought to bear by information technology in the realm of virtual proceedings necessitates a reconsideration of the term 'public'. The point needs to be reiterated that the word "public" in the context as used in the Constitution is elastic and can accommodate virtual proceedings. The Constitution was made with the advent of technology in mind. What is imperative therefore is whether a court proceeding conducted either in a regular courtroom or held virtually accords the parties fair hearing and fair

[79] Eleventh Edition, at page 1483

trial. This appears to be the hallmark of the Supreme Court decision in **Daniel v. FRN**,[80] where it was held thus:

> "**There are certain basic criteria and attributes to gauge whether or not a trial or hearing has been fair. These are:**
> **(i) That the court shall hear both sides not only in the case, but also in all material issues in the case before reaching a decision which may be pre-judicial to any party in the case;**
> **(ii) That the court or tribunal shall give equal treatment, opportunity and consideration to all concerned;**
> **(iii) That the proceedings shall be held in public and all concerned shall have access to and be informed of such place of public hearings;**
> **(iv) That having regard to all the circumstances, in every material decision in the case, justice must not only be done but manifestly and undoubtedly be seen to have been done."**

12.10 Thus having at the heart of this conversation the import of the word "public", the interpretation of the Constitution ought to go beyond literalism and adopt an elastic and expansive approach which accords with the attainment of its overall objective**.** In practical terms, virtual court proceedings are public in every sense of the word where for instance, the date and time and the link to join or observe the proceedings are published publicly. It is submitted that remote or virtual proceeding can pass every test of constitutionality just as an open court.

12.11 This point has been given judicial backing by the Supreme Court per Olabode Rhodes-Vivour, JSC in **A.G. Lagos State v. A.G. Federation & 1 Or.,** when his lordship held thus:

> **"Virtual sitting as of today are not unconstitutional."[81]**

12.12 Notwithstanding the above, it must be acknowledged that it is the role of the legislature in dire situation such as this to amend our laws in order to discourage unnecessary debates and confusion. For fundamental right matters, virtual court proceedings can be accommodated under the imperatives of the preamble in view of the fact that the paragraph 3(d) mandates the courts to

[80] (2014) 8 NWLR (Pt. 1410) 570 at 615, paras. E-G
[81] Suit No. SC/CV/260/2020, (unreported) delivered on 14/07/2020 during the height of the COVID-19 pandemic.

proactively pursue enhanced access to justice for all classes of litigants while paragraph 3(f) enjoins the courts to ensure the speedy and efficient enforcement and realization of human rights as it is evident that virtual court proceedings can make fundamental rights proceedings efficient and convenient without sacrificing the ends of justice on the alter of speed. Ultimately, what is best is for the specific inclusion of virtual court proceedings in the Constitution and Rules of Court including the FREP Rules.[82]

SUGGESTION ON IMPROVING ENFORCEMENT OF FUNDAMENTAL RIGHTS IN NIGERIA

- Improve Access to Justice
- Empower Institutions like the National Human Rights Commission and Public Defender bodies like Legal Aid Council of Nigeria
- Amend section 46(1) of the Constitution to give jurisdiction to Magistrate Court to hear and determine fundamental right cases.
- Making the filing of fundamental rights free of filing fees
- Education and enlightenment of the people on their fundamental rights through the media, workshops and trainings for lawyers.

13.0 CONCLUSION

13.1 We have examined key subjects relevant to the enforcement of fundamental rights in Nigeria. These subjects are critical to the enforcement of fundamental rights in Nigeria and they should be of great interest to judges, lawyers, academics, law students, civil liberty organizations and other interested players in the field of human rights enforcement. Fundamental rights enforcement proceedings have become a cornerstone of the Nigerian legal domain and it will continue to thrive as we all join hands together to learn, to grow and explore new dimensions in the practical realm of the enforcement of fundamental rights in Nigeria.

THANK YOU

[82] Chief Ogwu J. Onoja, SAN, "Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedents," Bar and Bench Publishers, (2020) Vol. II, p. 531.

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